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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1552

JOHN H. WEIDMAN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY MEMORANDUM

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I

The Decision Below Is In Conflict With This Court's Decision In *United States* v. *Agurs*, And The Decision Of The Fifth Circuit In *United States* v. *Deutsch*, On The Issue Of Whether A Prosecutor Is Required To Disclose Information, Favorable To The Defendant And Specifically Requested By Him, Which Is In The Possession Of Other, Non-Prosecutorial Agencies Of The Government

The first question presented is whether a prosecutor is required to produce information, favorable to the defendant and specifically requested by him, if the information happens to be in the possession of other, non-prosecutorial agencies of the government.

Here, the prosecutor failed to comply with petitioner Weidman's specific request, made pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), for the "entire NLRB file" regarding the unfair labor practice complaint made by Walter Cox. Cox was the prosecution's star

witness who testified at trial against petitioner, the president of Walsh Construction Company. Compliance with petitioner's *Brady* request would have led to the disclosure of a document prepared by NLRB Field Examiner Fender which recited, in handwritten affidavit-form, the account given him by Cox regarding the alleged improprieties at the Burns Harbor construction project on which the indictment of petitioner was based. Cox's statement, made to Fender (Pet. App. C), laid responsibility for the improprieties on other Walsh supervisory personnel, and in no way on petitioner Weidman, and thus contradicted Cox's subsequent trial testimony implicating petitioner.

The Court of Appeals held that the government's failure to produce the Cox statement was not constitutionally wrongful because the NLRB file "was not in the hands of the prosecution" (Pet. App. 28a) but rather in the possession of the NLRB.

1. The government argues (Br. in Opp. 7-9) that the Court need not address the significant constitutional question raised on the ground that, despite petitioner's specific request, Cox's statement was not sufficiently "material" to have required its production under *Brady* v. *Maryland, supra,* and *United States* v. *Agurs,* 427 U.S. 97 (1977). As the government implicitly recognizes, however, this contention finds no support in the Court of Appeals' decision, which rested solely on the broad ground that the *Brady* disclosure obligation did not extend to the documents in the possession of the NLRB. Moreover, although the government states that the district court concluded that the NLRB "documents were not 'of a material nature'" (Br. in Opp. 7), the district court's opinion refers only to the "documents relating to a purported attempt by Walter B. Cox to bribe an NLRB investigator, a Mr. Stanley J. Fender" (Pet. App. 11a)[1] and completely ignores the issue of the materiality of the Cox statement on the Burns Harbor improprieties. Instead, the district court discusses Fender's report of Cox's statement only in the context of the claim that it was required to be produced under the Jencks Act, 18 U.S.C. § 3500. Thus, neither the Court of Appeals nor the district court made any finding that the Cox statement was not sufficiently material to have mandated its disclosure under *Brady and Agurs.*

Moreover, the materiality of the Cox statement is fully evident, especially under the standard established in *United States* v. *Agurs, supra,* for specific requests by a defendant. As the Court there stated, the prosecutor is required to respond "if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists . . . *When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever excusable.*" 427 U.S. at 106. (emphasis added.) Here, Fender's report of Cox's statement constituted strong evidence tending to prove that Cox's trial testimony against petitioner was false, since it attributed the responsibility for the Burns Harbor improprieties to other Walsh supervisory personnel, and *not* to petitioner

[1] The documents covered by petitioner's *Brady* request which were produced by the government after trial were: (1) an NLRB letter to the United States Attorney requesting an investigation of the bribery attempt by Cox; (2) an FBI report of its investigation; (3) the United States Attorney's declination of prosecution; and (4) the Fender account of Cox's statement. The discussion of "materiality" in the district court's opinion refers to the first three documents, all of which, unlike the Fender document, expressly concern Cox's bribery attempt.

Weidman. It not only implicitly exculpated petitioner, but also directly contradicted Cox's subsequent testimony at trial, and hence clearly qualifies as evidence to which a criminal defendant is entitled under *Brady* and *Agurs*.

A similar situation was recently presented in *Jones* v. *Jago*, 575 F.2d 1164 (6th Cir., May 3, 1978) involving the state's failure to disclose a prior statement made by one of its trial witnesses, despite the defendant's specific *Brady* request for all such statements. The witness's statement described his own participation in the crime with which the defendant was charged, but made no reference to the defendant or his possible involvement. In the federal habeas proceeding challenging defendant's conviction, the state argued that the witness's statement "was neutral and hence not favorable" or exculpatory to the defendant because it merely failed to mention him. *Id.*, at 1166. Affirming the district court's decision that the state's nondisclosure of the witness's statement violated the defendant's right to due process, the Sixth Circuit stated:

> "The defense specifically requested the information. *The statement of an eyewitness to a crime which makes no reference even to the presence of the defendant or his participation must be viewed as a potentially powerful exculpation.*" *Id.*, at 1168. (emphasis added).

The Court further observed that "under *Agurs* . . . the threshold of materiality is relatively low where a specific request is involved." *Id.*, at 1169.

Cox's statement, which likewise did not implicate or attribute wrongdoing to petitioner, constitutes ana-

logously material and exculpatory evidence to which petitioner was entitled in view of his specific request. Of all the impeachment evidence, it alone would have shown the palpable falsity of Cox's trial testimony.

2. Turning to the central question whether the *Brady* disclosure obligation extends to non-prosecutorial agencies, the government seeks to distinguish *United States* v. *Deutsch*, 475 F.2d 55 (5th Cir. 1973), on the ground that the Post Office was considered part of the government for *Brady* purposes only because it was "closely connected" to the prosecution in that case. (Br. in Opp. 10). The same is true in the present case, however, since Cox's statement to the NLRB was taken by NLRB employee Fender as part of that agency's investigation of Cox's charges with regard to the activities of Walsh Construction Company and its personnel at the Burns Harbor project. Subsequently, petitioner was indicted and prosecuted in connection with those alleged Burns Harbor improprieties, and Cox became the prosecution's star witness against petitioner. Moreover, the NLRB had requested the investigation of Cox's alleged bribe attempt of Fender. After trial, it was disclosed that the documents relating to the United States Attorney's investigation of Cox's bribe attempt, including the NLRB memorandum requesting the investigation, were in the files of the United States Attorney's office.[2] In these circum-

[2] The "close connection" between the NLRB and the government could hardly be clearer, particularly in view of the presence of the "NLRB documents" in the U.S. Attorney's own files. The merest reference to any of the three withheld documents in the U.S. Attorney's files would have led to the fourth, the Cox statement, in the possession of the NLRB. Under *Brady* a prosecutor is held accountable for all office files, without regard to personal knowledge. *Giglio* v. *United States*, 405 U.S. 150 (1971). Here, of course,

stances, it is difficult to maintain that the NLRB's involvement was not at least as significant, if not more significant, than that of the Post Office in *Deutsch.*[3]

Accordingly, there is a clear conflict in the circuits regarding the scope of a prosecutor's duty under *Brady,* and this Court should grant the petition to resolve the conflict.

II

The Decision Below Conflicts With The Decision Of The Ninth Circuit in *Harvey Aluminum* v. *NLRB* And The District Of Columbia Circuit In *United States* v. *Bryant* On The Issue Of Whether The Jencks Act Requires A Prosecutor To Produce Witnesses' Statements In The Possession Of Other, Non-Prosecutorial Agencies Of The Government

The second question presented is whether the Jencks Act, 18 U.S.C. § 3500, requiring production of witnesses' statements "in the possession of the United States," applies to statements in the possession of non-

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the U.S. Attorney's office was at least presumably aware of the documents in its own files, since the U.S. Attorney had declined to prosecute Cox for bribery. Ordinary prudence would have led the prosecution to review the office files before using Cox as a witness against petitioner Weidman. Finding nothing helpful, it evidently decided not to pursue the matter further, without regard to whether disclosure of the documents would have assisted petitioner or led to other exculpatory evidence, such as the Cox statement.

[3] The government's quotation of the district court's statement that acceptance of petitioner's position would mean that the "prosecutor would be, in effect, obliged to contact every executive agency to see if a witness had made a statement to that office" (Br. in Opp. 10) is completely inapposite since it (1) was addressed to the Jencks Act issue, not the *Brady* issue; and (2) is factually inapplicable to this case, where the petitioner made a specific request identifying the particular agency and the file he desired pursuant to *Brady.*

prosecutorial agencies of the government. The Court of Appeals held that it did not so apply.

1. The government offers no satisfactory basis for distinguishing *Harvey Aluminum, Inc.* v. *National Labor Relations Board,* 335 F.2d 749 (9th Cir. 1964) and *United States* v. *Bryant,* 439 F.2d 642 (D.C. Cir. 1971), which establish that the Act covers more than just the prosecutor's own office or agency. In addition, in *United States* v. *Beasley,* 576 F.2d 626 (July 13, 1978), the Fifth Circuit recently held that the Jencks Act applied to a witness's statement later found in a local office of the Drug Enforcement Administration. As the Court stated:

> "Where armies are deployed in a war on crime, they must maintain sufficient discipline to fulfill their statutory and constitutional duties. The Jencks Act does not on its face restrict its command to the production of statements in the hands of, or known to, the particular prosecuting attorney assigned to the case, the U.S. Attorney's Office, the Criminal Section of the Department of Justice, or even the entire Justice Department. *Its order is unqualified.*" *Id.,* at 631. (emphasis supplied).

In view of the fact that Cox's statement was given to the NLRB in the context of its investigation of an unfair labor practice complaint involving the same alleged improprieties for which petitioner was indicted and prosecuted, and in view of petitioner's specific request for the NLRB file, we submit the Jencks Act applies to Cox's statement and that the decision below conflicts with the Act and the decision of the other circuits.

2. The government further argues that Cox's statement is not covered by the Act because Cox did not review it and "expressly refused to adopt or approve it." (Br. in Opp. 11). This, of course, was not the basis for the Court of Appeals' decision. Moreover, the document involved is Fender's handwritten, affidavit-form recital of the account given him by Cox. The district court expressly noted, and did not question, Fender's testimony that the "written document was a 'substantially verbatim' (Tr. 8/31/76, p. 178) account of what Cox told him and it contained 'the exact information' (Tr. 8/31/76, p. 161) Cox had supplied him." (Pet. App. 12a). Fender also testified that the statement "was written simultaneously with the interview." (Tr. 8/31/76, p. 178).

The government's claim that Cox refused to swear to the statement omits Cox's own qualification—"[i]n the absence of his attorney." (Tr. 8/31/76, p. 178). There is absolutely nothing in the record, either from Fender or Cox, giving the least hint that Cox or the prosecution questioned the accuracy of Fender's reporting of Cox's statement. The defendant's *prima facie* demonstration, through Fender's testimony, that the statement satisfied the requirement of 18 U.S.C. § 3500(e)(2) should be dispositive of the issue, in the absence of a contrary showing by the government. *See Goldberg* v. *United States,* 425 U.S. 94, 108-10 (1976); *Campbell* v. *United States,* 365 U.S. 85, 95-99 (1961); *Palermo* v. *United States,* 360 U.S. 343, 353-55 (1959). We therefore submit that there is no real question but that the Cox statement is within the Jencks Act, and that the petition should be granted by the Court.

III

The Decision Below Raises Substantial And Important Question Concerning The Admissibility Of "Prior Similar Acts" Under Rule 404(b) Of The Federal Rules Of Evidence

The third question presented is whether evidence of allegedly fraudulent activities by Walsh supervisory personnel in four earlier construction projects was properly admitted against petitioner, despite the absence of convincing proof that petitioner participated in, or was responsible for, any of these allegedly fraudulent practices.

The government admits that petitioner was not a participant in these other alleged schemes or crimes (Br. in Opp. 13-14), but defends the admission of the evidence on other grounds.

1. As to the evidence regarding the construction project at Sparrows Point, Maryland, the government claims that it was "not offered to implicate petitioner but only to show the existence of a fraudulent scheme in which both Walsh Contracting and Bethlehem Steel officials participated." (Br. in Opp. 13, n. 13). This argument overlooks the fact that the alleged Sparrows Point fraud, although originally embraced in the indictment's definition of the charged "joint criminal enterprise," had, with the prosecutor's consent, been striken from the indictment prior to trial, so that the Sparrows Point evidence, to be received, would have to pass muster under the "similar offense" rule. Petitioner Weidman, however, had nothing to do with the project and was not shown to have any awareness of the alleged fraud.

2. As to the Midwest Steel project and Great Lakes project, the government argues that the evidence

was properly admissible against petitioner under the "similar offense" rule of Fed. R. Evid. 404(b) to show petitioner's intent, plan, and knowledge. The government concedes the total absence of evidence that petitioner participated in these other alleged schemes, but contends it suffices that a National Steel auditor brought some claimed overcharges at these projects to petitioner's attention after they occurred.

The government does not explain how the simple fact of petitioner's after-acquired knowledge of alleged misconduct by company employees at other projects can be probative of petitioner's intent in the Burns Harbor project or why it should open the door to allow the introduction of evidence that was extremely prejudicial to petitioner. It cites no authority for the proposition that evidence of crimes in which a defendant did *not* participate, but only heard about after those crimes occurred, can be used to prove defendant's guilty intent in some other alleged crime. The rule is to the contrary, as the Fifth Circuit held in both *United States* v. *Jaqua*, 485 F.2d 193, 195 (5th Cir. 1973) (evidence of defendant's prior "criminal activity" improperly admitted where there was no "evidence in the record that [the defendant] committed these acts"), and *United States* v. *Vosper*, 493 F.2d 433, 437 (5th Cir. 1974) (similar offense evidence inadmissible where there was "little, save [defendant's] presence [and the guilt of his associate] to show that he had any responsibility for or participated in" the prior robbery). Absent clear and convincing proof of personal participation, admission of "similar offense" evidence in cases such as the present is nothing more than an endeavor to establish guilt by association.

3. As to evidence of fraudulent practices at the fourth project (Weirton), the government does not suggest any reason for its admissibility. The government concedes that the petitioner had no knowledge of any of the alleged practices at this project. (Br. in Opp. 13, n. 13). Nevertheless, the evidence was admitted and inevitably used to tar petitioner with the conduct of other company personnel.

4. As to petitioner's contention that the above evidence was additionally irrelevant because no defense of intent was asserted, the government responds only that specific intent to defraud is an essential element of the mail fraud offense which it was required to prove and that petitioner's failure to contest the issue of intent is immaterial. This conflicts with the recent decision of the Second Circuit in *United States* v. *O'Connor*, —— F.2d ——, No. 77-1378 (July 10, 1978), involving a charge that the defendant received money from meat packing companies in connection with his official duties in violation of 21 U.S.C. § 622. Holding that evidence of defendant's prior receipt of bribes was inadmissible on the issue of intent because no such defense was asserted, the Court stated:

> "In the case before us, the Government argued to the trial judge that the evidence of other crimes should be admitted to 'prove intent, plan, knowledge, and the absence of any mistake or accident.' Despite defense counsel's protestation that there was no real issue of intent, the judge admitted the disputed testimony as relevant to defendant's intent and plan, and so advised the jury. On this record, the former theory was incorrect. As we pointed out in [*United States* v.] *Bennedetto* [571 F.2d 1246 (2d Cir. 1978)]:

> Defendant did not claim that he took the money from the [three] companies named in the indictment innocently or mistakenly. He claimed that he did not take the money at all. Knowledge and intent, while technically at issue, were not really in dispute . . .
>
> *Id.* at 1249; see also *United States* v. *DeCicco*, 435 F.2d 478, 483-84 (2d Cir. 1970)." (Slip Op. 3869-3870). (footnotes omitted).

The same conclusion obtains here, since petitioner likewise did not raise intent as a defense. The decision below is thus in conflict with that of the Second Circuit in *United States* v. *O'Connor, id.*.

The Fifth Circuit has also rejected the approach of the decision below. In *United States* v. *Silva*, —— F.2d ——, No. 77-5639 (September 13, 1978), the Fifth Circuit reversed defendant's conviction for distribution of narcotics, in violation of 21 U.S.C § 841(a)(1), because the trial court had admitted evidence of subsequent crimes to show defendant's intent, even though the defendant flatly denied any participation in the crime charged and raised no issue of intent. The Court explained that for such evidence to be admissible, "the element of the prior crime for which there is a recognized exception [*e.g.* "intent"] must be a material issue in the case." (Slip. Op. 6949). It continued:

> "Applying this test to the present case, the testimony concerning the appellant's subsequent acts clearly fails to meet the third prerequisite and therefore should not have been admitted. In determining that intent was never a material issue, we are guided by the proposition that the materiality of intent depends, not on the statutory definition of the offense, but on the circumstances of the case and on the nature of the defense. *United States* v. *Adderly*, 529 F.2d 1178, 1181 (5th Cir. 1976). In the present case the defendant's sole defense was that of mistaken identity. This court has acknowledged in *Adderly, supra* at 1181, that a defendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred." (Slip. Op. 6949.)

This Court should therefore resolve the conflicts in the circuits.[4]

CONCLUSION

For the reasons stated, it is respectfully requested that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the for the Seventh Circuit.

Respectfully submitted,

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[4] Copies of the recent decisions cited in this memorandum have been provided to the Clerk of the Court.